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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

BAIL APPLICATION NO.1352 OF 2023

Turre Musa ...Applicant
vs.
The State of Maharashtra ...Respondent

Mr. Dilip Mishra i/b. Mr. Ayaz Khan for the Applicant.
Mrs. Geeta Mulekar, APP for the Respondent/State.

CORAM : N. J. JAMADAR, J.
RESERVED ON : 5TH JANUARY, 2024
PRONOUNCED ON : 23rd JANUARY, 2024

P.C.:

1. The Applicant who is arraigned in Crime No. 25 of 2019 for the offences punishable u/s. 22(C) r/w. section 8(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act"), u/s. 3(1)(ii), 3(2) and 3(4) of Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as "MCOC Act"), u/s. 3(2)(a) and 14 of the Foreigners Act, 1946 and u/s. 5 of the Passport Act, 1920 has preferred this Application to enlarge him on bail.
2. On 23rd February, 2019 at about 4.30 AM Dongari Police were on patrol on the railway track at Wadi Bundar. Three persons, who

appeared to be the foreign nationals, were found loitering suspiciously. After noticing the police party, the said persons attempted to flee away. They were chased and accosted. Preliminary interrogation revealed that those persons were drug peddlers.

3. After following the procedure prescribed in Section 50 of the NDPS Act personal search of those persons was conducted in the presence of two public witnesses. The first person – Okpala Chigbo Benidict, the Accused No. 1 was found in possession of 55 grams of Mephedrone (MD). The Accused No. 1 is a Nigerian national. The contraband article was seized and samples were collected. The second person was the Applicant. In the personal search of the Applicant, after apprising him of his right u/s. 50 of the NDPS Act, 61 grams MD was found kept in the right pocket of the trouser. The contraband article was seized and sample collected. Likewise in the personal search of Ramond Anitwi, the Accused No. 3, 57 grams of MD was found concealed in the right pocket of the trouser. The said contraband article was also seized and sealed. A search was conducted at the premises of Accused No. 4 - Ique Chickweni Emanuel and 20 grams MD was recovered from the

premises.

4. It transpired during the course of the investigation that Accused No. 4 - Ique Chickweni Emanuel was a habitual drug peddler. He was operating a drug syndicate. The Applicant and the Co-accused - Okpala Chigbo Benidict and Ramond Anitwi were members of the organized crime syndicate of which the Accused No. 4 - Ique Chickweni Emanuel was the gang leader. The investigation revealed that the Applicant and the co-accused, including the gang leader, were often seen together and there were continuous conversations between them. Hence, having found that the said syndicate indulged in continuing unlawful activities and more than two charge-sheets were lodged against the Accused No. 4 - Ique Chickweni Emanuel, the provisions contained in MCOC Act were invoked.

5. Learned Counsel for the Applicant submitted that the Applicant was arrested on 23rd February, 2019. The charges were framed on 15th February, 2022. The evidence of prosecution's first witness is still being recorded. The prosecution proposes to examine 61 witnesses. Thus, having regard to the fact that for almost 5 years there has not been any substantial progress in the

trial, the Applicant deserves to be released on bail on the ground of long incarceration.

6. Learned Counsel for the Applicant submitted that there is a clear breach of mandate contained u/s. 50 of the NDPS Act. Neither the Applicant nor the co-accused, as is evident, was apprised of the right to be searched in the presence of “Magistrate”. Resultantly, the entire search is vitiated. Thus, the Applicant deserves to be released on bail for the search having been vitiated, the Applicant cannot be said to have committed the offences punishable under NDPS Act. To lend support to this submission, the learned Counsel for the Applicant placed a strong reliance on the decision of the Supreme Court in case of **Beckondan Abdul Rahiman vs. State of Kerala** reported in **(2002) 4 SCC 229**.

7. Mr. Mishra, learned Counsel for the Applicant further submitted that the invocation of the provisions of MCOC Act was wholly unwarranted. There are no criminal antecedents of the Applicant, nor the Applicant has ever been implicated alongwith Ique Chickweni Emanuel, the alleged gang leader, in any of the offences registered against the said Accused No. 4. Therefore, the

prosecution case that there is an organized crime syndicate is wholly unsustainable. Thus, the bar contained u/s. 21 of the MCOC Act does not come into play.

8. The learned APP resisted the prayer for bail. Taking the Court through the Affidavit-in-Reply filed by Mr. Kailaschandra B. Avhad, Assistant Commissioner of Police on behalf of the Respondent, it was urged that there is adequate material to demonstrate that the Applicant is a member of the organized crime syndicate. On the aspect of alleged non-compliance of the mandate contained in Section 50 of the NDPS Act, it was submitted that the said question can be decided at the stage of trial. At this juncture, the alleged non-compliance of Section 50 of the NDPS Act cannot be delved into while considering the prayer for bail.

9. Learned APP further submitted that the Applicant, being a foreign national, has no roots. If the Applicant is released on bail, there is imminent danger of the Applicant fleeing away and not being available for the trial. Therefore, the Applicant does not deserve to be released on bail.

10. In cases of the present nature where statutory restrictions in the matter of grant of bail operate not under one but two

enactments, the material is required to be appreciated carefully. I have carefully considered the material on record including the contentions in the Affidavit-in-Reply filed on behalf of the Respondent.

11. To begin with, Mr. Mishra has pressed into service the two grounds. The first, non-compliance of the mandatory requirement contained in Section 50 of the NDPS Act and, second, the breach of the provisions contained in Section 52-A of the NDPS Act, 1985.

12. On the first ground, the thrust of the submission of Mr. Mishra was that in the First Information Report (FIR) as well as the seizure memo, it is recorded that the Applicant and the co-accused were apprised of their right to be searched in the presence of gazetted officer only and “not the Magistrate”. The failure to apprise the person his right to be searched in the presence of the Magistrate, according to Mr. Mishra, vitiates the search.

13. In the FIR as well as seizure punchanama, as regards the compliance of the appraisal of the right to be searched in the presence of the gazetted officer or the Magistrate, following endorsement finds mentions:

"As per NDPS act 1985 sec 50 you have right, to demand for gazetted officer at the time of your personal search, we will make the arrangement"

14. *Prima facie*, the aforesaid appraisal of the right does not appear to be in conformity with the requirement envisaged by sub-section (1) of Section 50 of the NDPS Act, 1985, which reads as under:

"50(1). When any officer duty authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate."

15. It appears that the Applicant was apprised only of his right to be searched in the presence of nearest gazetted officer and not "the Magistrate". Since, the right to be searched before the Magistrate is a valuable right of the person designedly provided by the legislature to give an element of sanctity to the search and also rule out the possibility of planting and false implication, failure to apprise the right to be searched before the Magistrate cannot be said to be inconsequential. *Prima facie*, the omission is such that it erodes the sanctity of the search considerably.

16. In case of **Beckondan Abdul Rahiman (supra)**, on which reliance was placed on behalf of the Applicant, the Supreme Court held that failure to apprise the Accused of his right to be searched in the presence of Magistrate impairs the search. After following the constitution bench judgment in case of **State of Punjab vs. Baldev Singh [1999(6) SCC 1721]** the Supreme Court enunciated the law as under:

"5. In this case the violation of the mandatory provisions is writ large as is evident from the statement of K.R. Premchandran (PW 1). After recording the information, the witnesses are not shown to have complied with the mandate of sub-section (2) of Section 42 of the Act. Similarly the provisions of Section 50 have not been complied with as the accused has not been given any option as to whether he wanted to be searched in the presence of a gazetted officer or the Magistrate. The compliance with Section 50 is held to have been fulfilled on his (PW 1) asking the accused "whether I should search him in the presence of senior officers or a gazetted officer". The accused was required to be apprised of his right conferred under Section 50 giving him the option to search being made in the presence of a gazetted officer or the Magistrate. The accused is not shown to have been apprised of his right nor any option offered to him for search being conducted in the presence of the Magistrate.

6. We are of the firm opinion that the provisions of sub-section (2) of Section 42 and the mandate of Section 50 were not complied with by the prosecution, which rendered the case as not

established. In view of the violation of the mandatory provisions of the Act, the appellant was entitled to be acquitted. Both the trial court as well as the High Court have failed to consider this aspect of the matter which warrants the setting aside of the impugned judgment."

17. On the aforesaid touchstone, reverting to the facts of the case, the non-compliance of the mandate of the Section 50 of the NDPS Act. 1985 is writ large.

18. On the aspect of invocation of the provisions contained in MCOC Act, I find substance in the submission of Mr. Mishra that the applicability of bar contained in Section 21 of the MCOC Act is required to be decided in the light of the material, which prima facie does not indicate that the Applicant is a member of the alleged organized crime syndicate led by the Accused No. 4.

19. No crime has been registered against the Applicant apart from the subject crime. Secondly, the prosecution's claim does not seem to be based on continuing unlawful activity engaged by the syndicate on the basis of filing of charge-sheets but on the basis of the statement of witnesses that they had seen the Accused No. 4 and the Applicant together and the CDR. It is suffice to note the following contentions in the Affidavit-in-Reply.

16. I say that there is nexus between the present Applicant/Accused with co-accused wherein the Applicant/Accused is a member of "Organized Crime Syndicate" these accused persons were seen together by witnesses below the Wadi Bandar Bridge, on railway Track while selling drugs to drug addicts. There are witnesses who had seen these accused staying and moving together. The photographs of accused persons Remond Anitw @ Ramond Antwi and Applicant/Accused Okpala Benedict @ Benedith were found in the mobile phone of accused Remond Anitw @ Remond Antwi. Same has been extracted from said mobile phone under the panchnama and with the help of mobile phone expert. All the accused persons found in possession of ban Mephedrone (MD) drug at the time of their arrest and same was seized under the panchnama."

20. It would be relevant to note that the Applicant is not shown as Accused in the Special LAC No. 171 of 2015 and CR No. 79 of 2016 in which the charge-sheets have been lodged against the Accused No. 4-Ique Chickweni Emanuel, the gang leader. In the chart (Exhibit-B) annexed to the Affidavit-in-Reply, apart from subject crime, there is no antecedent to the discredit of the Applicant. Thus, the submissions of behalf of the Applicant that invocation of the provision contained in MCOC Act appears to be debatable, *prima facie*, carries substance.

21. Lastly, the aspect of long incarceration. The Applicant is in custody for almost 5 years. The first witness is in the witness box.

The prosecution proposes to examine 58 witnesses. It is realistically not possible to conclude the Trial in near future. This long period of incarceration impinges upon the right to life guaranteed under the Constitution and renders the further detention of the Applicant as an under-trial prisoner unsustainable.

22. The conspectus of the aforesaid consideration is that *prima facie* there appears a fundamental defect in search as the mandate contained in Section 50 of the Act, 1985 cannot be said to have been scrupulously adhered to. It also does not appear that the investigating agency has complied with the provisions contained u/s. 52-A of the NDPS Act, 1985. The invocation of the provisions of MCOC Act on the ground that the Applicant is a member of the organized crime syndicate also seems to be debatable. To add to this, the prolonged period of incarceration renders further detention of the Applicant as an undertrial prisoner unsustainable.

23. I am therefore inclined to hold that the interdicts contained in section 37 of the NDPS Act and Section 21 of the MCOC Act do not come into play. There are no criminal antecedents. It is

unlikely that the Applicant would indulge in the identical offences for which he has been arraigned in this case. The apprehension on the part of the prosecution can be taken care of by imposing stringent conditions.

24. Hence, the following order.

: O R D E R :

- (i) Application stands allowed.
- (ii) The applicant be released on bail in CR No. 25/2019 registered with Dongri Police Station, Mumbai, on furnishing a PR Bond in the sum of Rs.50,000/- with one or two sureties in the like amount.
- (iii) The applicant shall not contact or give threat or inducement to any of the witnesses or any person acquainted with the facts of the case.
- (iv) Subject to the deportation proceedings which the authorities may resort to, the Applicant shall surrender his passport before the Special Court and shall not leave the jurisdiction of the Special Court without prior permission.

- (v) The applicant shall furnish the details of his permanent address and cell phone number to the Investigating Officer and keep him informed about the change, if any.
- (vi) The applicant shall regularly attend the proceedings before the jurisdictional Court.
- (vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial court shall not be influenced by any of the observations made hereinabove.

Application stands disposed.

(N. J. JAMADAR, J.)